STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DWAYNE LAMAR HOOSIER, Defendant-Appellant.	UNPUBLISHED September 30, 2010 No. 292156 Oakland Circuit Court LC No. 2008-223959-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted of three counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b, and one count each of assault with intent to do great bodily harm, MCL 750.84, unarmed robbery, MCL 750.530, and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 30 to 60 years for each CSC conviction, 15 to 60 years for the assault conviction, and ten to 30 years each for the robbery and unlawful imprisonment convictions. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that defendant, the father of her two youngest children, in a fit of jealousy over whom complainant had been telephoning, entered her house in the early morning hours of October 25, 2008, said "wake up bitch," struck her repeatedly in the head, forced her to drive them to an ATM to withdraw cash to surrender to him, lashed her buttocks with a belt, and forcibly penetrated her with his penis, vaginally, orally, and anally, during the course of which he several times threatened to kill her.

On appeal, defendant argues that he was denied a fair trial by introduction of certain hearsay testimony and by admission of evidence that defendant had engaged in some similar conduct earlier. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). However, a criminal defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

I. HEARSAY

Hearsay, meaning testimony as to another person's unsworn, out-of-court assertions offered to prove the truth of the matters asserted, is presumptively inadmissible, subject to several exemptions and exceptions as provided by the rules of evidence. MRE 801-805. Defendant makes issue of four occurrences in the testimonial record, two from complainant's mother, one from her emergency-room physician, and one from her daughter.

Complainant's mother testified that, the morning after the incident in question, complainant, while "hysterical" and "sobbing" stated that defendant "beat" her, and then protested when the mother said she would call the police. Defense counsel raised a hearsay objection, in response to which the prosecuting attorney argued that the statements were admissible as excited utterances. See MRE 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). After complainant's mother elaborated that complainant at that moment appeared "[t]otally disheveled," as well as bruised and swollen, the trial court overruled the objection, but cautioned the prosecuting attorney to "get into it just briefly." The mother testified that complainant expressed the fear that defendant would kill her if the police were called.

Defendant argues that too much time had passed for complainant to have remained under the stress of what had occurred. We find this argument is unpersuasive. "While the time that passes between the event and the statement is important in determining whether the declarant was still under the stress of the excitement when the statement was made, the focus of the exception is on the declarant's lack of capacity to fabricate, not the lack of time to fabricate." *People v Layher*, 238 Mich App 573, 583; 607 NW2d 91 (1999) (internal quotation marks and citation omitted). Accordingly, a declarant might still be considered under the stress of a startling event even a week afterward. See *Layher*, 238 Mich App at 583-584. In this case, only several hours separated the events complainant described and her emotional outpouring to her mother, and she was described as "hysterical," "sobbing," and "disheveled" at the time. Thus, the trial court did not err in concluding that the excited-utterance exception to the hearsay prohibition applied.

Complainant's mother further testified that, after the police and paramedics came, she drove complainant to the hospital, during which drive complainant added, "he raped me for six hours," then continued that complainant said "she was told if she didn't keep it hard he would kill her," and that "he threatened to kill her by snapping her neck and so forth." There was no renewed hearsay objection, but because this part of the narrative so closely followed the one that gave rise to a hearsay objection, and its overruling, we deem the objection to have covered the additional testimony, leaving this issue preserved in this regard. We further regard complainant's mother's description of complainant during that drive as, although calmer than immediately before, nevertheless having "moments of . . . quiet sobbing," and appearing to be in a state of "shock," as confirming that the excited-utterance exception remained in effect. This testimony was admissible. MRE 803(2).

The emergency-room physician who treated complainant testified that complainant presented complaining of physical and sexual assault. The physician elaborated that complainant detailed that "she had been struck with . . . a fist," "[h]it with a belt," and "had been sexually

assaulted . . . . Orally, vaginally and rectally, that she had been penetrated with a penis through all three orifices," then added that she had been "choked and that her head had been pushed very hard against a wall." There was no hearsay objection, and so no record of the basis upon which this hearsay came into evidence, but defendant on appeal properly focuses on the hearsay exception set forth in MRE 803(4) covering "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing . . . present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

Defendant argues that this exception did not apply because complainant had no self-interested motivation to tell the truth in that situation, and suggests that the conversation at issue was more like a therapy session than one to treat physical injury, but cites no authority for the proposition that only persons seeking treatment for the most severe of injuries have a self-interested motivation to speak truthfully to a doctor concerning how they acquired those injuries. Defendant additionally argues that complainant's reports of what defendant had done to her were not reasonably necessary for any treatment she received, but provides no authority for the proposition that anything less than the full account an injured person provides to a healthcare worker of how those injuries came about falls under the hearsay exception set forth in MRE 803(4). Complainant, in the emergency room with apparently serious bruises and a cut, had every incentive to tell the doctor the whole truth, deferring to the doctor to select from that account what information she might find useful and act upon. For these reasons, this testimony was properly admitted.

Complainant's ten-year-old daughter, testified to hearing "smacking," "[b]ed springs," "door slamming," and "yelling," and added that she heard complainant say "stop" about five times. When the prosecuting attorney began asking the child what complainant told her about the incident, defense counsel raised a hearsay objection and the trial court advised the child to speak only to what she had seen or heard herself. After a bench conference, however, defense counsel withdrew his objection, and the child went on to testify that, a "couple of nights" after the events in question, complainant, in explaining some of the noises that the child had heard, "said that . . . he was hitting her."

Because defense counsel affirmatively withdrew what had been a sustained objection and allowed the testimony, appellate objections in the matter are waived. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Further, a strategic reason for that withdrawal is apparent. Defendant himself admitted that he had slapped complainant and, during closing argument, defense counsel pointed out that the child reported hearing slapping, but not punching, kicking, or the throwing of objects, and that defendant himself had admitted to slapping. Thus, the defense conceded some aggression on defendant's part in strategic hopes of causing defendant's denials of the more serious aggression to appear all the more credible, and the child's account of complainant's speaking of having been slapped, but only that, comported with that strategy.

For these reasons, defendant's argument that he was denied a fair trial through improper introduction of hearsay testimony must fail.

II. BAD ACTS

MRE 404(b)(1) establishes that evidence of other bad acts is not admissible to prove a person's character in order to show behavior consistent with those other wrongs, but provides that such uncharged conduct may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material . . . ." MRE 404(b)(2) requires that a prosecutor wishing to introduce such evidence provide notice of that intent. See also *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Defendant protests that the prosecution filed no motion to admit bad acts evidence. However, MRE 404(b)(2) demands no such motion, but instead requires only that a prosecutor wishing to introduce bad acts evidence provide notice of that intent, and the record in this case includes such notice, dated February 24, 2009. Defendant's argument that there was a failure of notice is meritless.

At trial, the following exchange occurred, without objection, between the prosecuting attorney and complainant:

Q: [H]ad the Defendant ever done anything like this to you before?

A: He had hit me once before and threatened me.

Q: Okay. And when was that?

A: In January of 2008.

Q: And what was the reason he did it in January of 2008?

A: Another phone number.

Q: Was it the same phone number that caused what happened in October 25th?

A: Yes.

Q: It was the same phone number?

A: Yep.

Q: Okay. And as a result of that, he hit you?

A: Yes.

Q: Where did he hit you that time?

A: The same thing, in the head.

Q: Okay. [Y]ou said he had threatened you as well. What kind of things did he say to threaten you?

A: He said bitch, you think this is a game. You know, next time I'll kill you.

This testimony was presented for a proper purpose. Jealously over whom complainant had been calling, striking her on the head, calling her "bitch," and threatening to kill her well showed defendant's "motive, . . . intent, . . . scheme, plan or system in doing an act," as to why he became agitated and how he responded. Admission of that testimony was not plain error.

Further, it may have helped defendant more than it hurt him. Again, the defense strategically conceded that defendant had struck complainant on the occasion in question, while denying that any sexual aggression took place. The description of the earlier episode that the prosecuting attorney elicited from complainant, having included no allegation of sexual violence, comported with the defense's theory of the instant case.

For these reasons, defendant's arguments concerning the induction of other bad acts in his part must fail.

III. ASSISTANCE OF COUNSEL

Defendant additionally argues that defense counsel was ineffective insofar as counsel declined to raise objections in connection with his issues on appeal. However, as noted, defense counsel did object to some of the hearsay, did not object in situations where an objection would have been futile,[1] and strategically waived objections in another. The record reveals no deficiencies in counsel's performance.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

[1] See *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989) ("Counsel is not obligated to make futile objections.").